

WEAR, IMPLEADED SUB. NOM. WEAR SAND
COMPANY, ET AL. *v.* STATE OF KANSAS EX REL.
BREWSTER, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 30. Argued November 12, 1917.—Decided November 26, 1917.

A specific intent to accept the tidal test of navigability, and so to extend riparian ownership *ad filum aquæ* on non-tidal streams which are navigable in fact, is not predicable of a statute adopting the common law of England in general terms only, particularly if enacted later than the decision in *The Genessee Chief*, 12 How. 443. Hence such a statute, passed by Kansas Territory in 1859 and retained by the State, affords no basis even in purport for denying the power of the Supreme Court of Kansas to apply the test of navigability in fact, as part of the common law, in determining the ownership of a river bed as between the State and riparian owners deriving title under a federal patent issued, before statehood, in 1860.

In a mandamus proceeding to test the right of a State to levy charges on sand dredged from a stream by a riparian owner under claim of title *ad filum aquæ*, the latter has not a constitutional right to have the question of navigability determined by a jury.

Whether in such a case the state court may take judicial notice that the stream is navigable is a question of local law. So held where judicial notice was taken of the navigability of the Kaw River, the principal river of Kansas, at the state capital, and the decision was supported by the meandering of the stream in original public surveys, and by various state and federal statutes and decisions cited.

154.

Opinion of the Court.

Assuming that the taking of sand from the bed of a navigable stream be of common right, the State may nevertheless exact a charge from those who take it.

River sand appertains to the river bed when at rest; its tendency to migrate does not subject it to acquisition by mere occupancy.

92 Kansas, 169, affirmed.

THE case is stated in the opinion.

Mr. Francis C. Downey, with whom *Mr. Armwell L. Cooper* and *Mr. Denis J. Downey* were on the brief, for plaintiffs in error.

Mr. J. L. Hunt, Assistant Attorney General of the State of Kansas, with whom *Mr. S. M. Brewster*, Attorney General of the State of Kansas, and *Mr. J. P. Coleman* and *Mr. S. N. Hawkes*, Assistant Attorneys General of the State of Kansas, were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for mandamus to require the Treasurer of the State to transfer certain funds from a special account to the general revenue funds of the State, so that they can be used for paying the expenses of government. The money in question was collected under the State Laws of 1913, c. 259, requiring payment of ten per cent. of the market value on the river bank of sand taken by private persons or corporations from the bed of streams subject to the control of the State. It was paid by the plaintiffs in error for sand taken from the Kansas River at Topeka, and it was kept as a separate fund because the plaintiffs in error paid it under duress and protest and claimed the right to recover it before it should lose its identity by the transfer demanded. Under the state procedure the plaintiffs in error were made parties and came in and set up title to the fund. The Supreme Court of the State over-

But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the State is navigable at the capital of the State we certainly cannot pronounce it error. In this aspect it is a question of state law. *Donnelly v. United States*, 228 U. S. 243, 262. See *Archer v. Greenville Sand & Gravel Co.*, 233 U. S. 60, 68, 69. The fact is of a kind that should be established once for all, not perpetually retried. The court had too, in favor of its decision, the circumstance that the stream was meandered in the original surveys; the decisions of its predecessors; *Wood v. Fowler*, 26 Kansas, 682; *Topeka Water Supply Co. v. Potwin*, 43 Kansas, 404, 413; *Johnston v. Bowersock*, 62 Kansas, 148; *Kaw Valley Drainage District v. Missouri Pacific Ry. Co.*, 99 Kansas, 188, 202; *Kaw Valley Drainage District v. Kansas City Southern Ry. Co.*, 87 Kansas, 272, 275, s. c., 233 U. S. 75; legislation of the State; Private Laws of 1858, c. 30, § 4, c. 31, § 4, c. 34; 1860, c. 20, § 3, etc.; and of the United States; Act of May 17, 1886, c. 348, 24 Stat. 57; Act of January 22, 1894, c. 15, 28 Stat. 27; Act of July 1, 1898, c. 546, 30 Stat. 597, 633, etc.; and the assent, so far as it goes, of this court; *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U. S. 75, 77, not to speak of the allegations in the answers of the Wear Sand Company, adopted, notwithstanding his denial of navigability, by Fowler, the other plaintiff in error before this court.

The allegation that the sand is migratory and belongs to whoever may reduce it to possession, and the allegation of the public right, are inconsistent, of course, with the claim of title and hardly consistent with the allegation that it is got by dredging. But the fact that it is liable to be shifted does not change its character while at rest upon the river bed, and if there were the public right alleged, it would not hinder the State from collecting, for the good of the whole public, a charge from those individuals who withdraw it

154.

Syllabus.

from public access. We see nothing in the case of the plaintiffs in error that requires further answers that might be made, or discussion at greater length.

Judgment affirmed.
